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C O N F I D E N T I A L SECTION 01 OF 02 PRETORIA 002605

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SUBJECT: COURT HEARS STATE'S APPEAL OF ZUMA DECISION, WILL
RULE NEXT YEAR

REF: A. PRETORIA 2097

[1](#)B. PRETORIA 2125

[1](#)C. PRETORIA 2223

[1](#)D. PRETORIA 2497

[1](#)E. PRETORIA 2576

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Classified By: Political Counselor Raymond L. Brown for Reasons 1.4 (B)
and (D).

Summary

[1](#)1. (U) The Supreme Court of Appeal on November 28 reserved judgment until January 12 in the National Prosecuting Authority's (NPA) appeal against a high court ruling that halted the prosecution of African National Congress (ANC) President Jacob Zuma. The atmosphere outside the court was reportedly subdued compared with the atmosphere outside the Pietermaritzburg High Court in September. Both legal teams made their arguments and former President Thabo Mbeki, whose request for appeal was denied by the Constitutional Court on a technical point because the Supreme Court of Appeal was prepared to hear the state's appeal, sought to convince the Court that he should be party to the NPA's appeal since he was named in the Nicholson verdict. The five-member Supreme Court of Appeal will need to reach a consensus before making a decision and has said they will issue a notice if they need to delay the ruling. End Summary.

The Atmosphere and the Arguments

[1](#)2. (U) There was far less build up for this court date than for the case heard by the Pietermaritzburg High Court in September. Few of Zuma's most strident supporters such as ANC Youth League President Julius Malema made statements threatening the judicial system while Zuma himself largely focused on the ANC's campaign for the election next year. The "Mail and Guardian" reported that roughly 3,000 ANC supporters were expected to protest outside the Supreme Court of Appeal in Bloemfontein, but there was no verification of how many protesters were there and some press reports suggested there were only 1,000 supporters. By most accounts, there were few disruptions from Zuma's supporters or scuffles between his allies and security personnel. Zuma was surrounded by numerous bodyguards while police and security officials surrounded the court house's main entrance

and restricted journalists' access to ensure protection for those inside the court room.

¶3. (U) The state's appeal largely rests on three points. First, the state argued that Nicholson was "wrong" to imply that there was political interference by the state in the December 2007 decision to refile charges against Zuma. Second, the state asserted that Nicholson's interpretation of an accused person's constitutional right to make representations to the NPA was "flawed." Third, the state argued against Nicholson's implication that Zuma was the victim of a political conspiracy. Zuma's team countered these points by arguing that Nicholson's interpretation was sound and that Nicholson's comments on Mbeki were "his opinion and not the crux of the appeal."

What Comes Next

¶4. (C) Senior legal counselor and potential High Court judicial nominee Billy Mothle told Poloff on November 26 that three of the five justices on the Supreme Court of Appeal would have to agree on a judgment. (Note: Mothle in the past has told Poloff that the Nicholson decision was not sound legally and that the government had to appeal it. For more information see Reftel A. End Note). The Supreme Court of Appeal's decision on this case will have numerous implications for all involved. For the NPA, if the Court upholds the Nicholson verdict, it would be a blow to the state's argument that state institutions are not influenced by intra-party political wrangling. A decision in favor of the state, however, would pave the way for the NPA to recharge Zuma with corruption immediately. For Zuma, a

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ruling by the Court to uphold the Nicholson verdict would make him nearly unstoppable in his quest for the national presidency. Yet, a decision in favor of the state would further damage of the ANC President's image, disrupt the ANC's election campaign, and set the scene for more bickering between the ruling party and the judiciary. For Mbeki, if the Court strikes down Nicholson's comments about the former President's alleged interference in Zuma's prosecution it would vindicate the former leader and his backers in the ruling tripartite alliance. However, if the Court concurs with the Nicholson verdict it would hugely embarrass Mbeki, who has always portrayed himself as a victim of precipitous action and a strict constitutionalist.

Comment

¶5. (C) There are few signs of how the Supreme Court of Appeal ultimately will rule. However, the Court's decision, whenever it comes, will carry significant legal and political impacts for all involved. With the judgment pushed to January 12, the ANC may push forward on plans to hold the national election in the first quarter of 2009 to ensure that Zuma is in position to take the presidency while the legal process drags out. This means the March 25 election date being recommended by the ANC leadership may be increasingly likely. (For more information on the election date discussion see Reftel E. End Note).

LALIME